Supreme Court, U. S.
FILED
JUN 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.,
and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR PETITIONERS

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:

SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	3
Statement	4
The Facts	4
The Litigation	8
Summary of Argument	10
1. Preemption	10
2. Free Speech	12
Argument	
I. Where respondents, American citizens, complained of petitioners' conduct in the port of Mobile, Alabama, alleging activities violative of the Act's Section 8(b)(4), Alabama state courts were without jurisdiction to grant injunctive relief, notwithstanding the objects of the pickets were foreign flag vessels. Such conduct is preempted by the NLRB	14
II. Peaceful, primary, informational picketing to protest the loss of domestic jobs to foreign flag vessels paying wages and benefits substandard to American flag vessels, concomitantly requesting persons to ostracize and not patronize such foreign flag vessels, is an exercise of constitutionally protected freedom of speech and should not have been enjoined by the Alabama courts	19
Conclusion	27

TABLE OF AUTHORITIES

PAGE

Cases:

Allee v. Medrano, —— U.S. ——, No. 72—1125, decided May 20, 1974 ..... 12, 20, 23
Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 313 ..... 12, 13, 20, 23

Benz v. Compania Naviera Hidalgo, 353 U.S. 138 ..... 10, 11, 15, 17, 18
Building Service Employees International Union v. Gazzam, 339 U.S. 532 21

Carlson v. California, 310 U.S. 106 23

Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 24

Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485 ..... 12, 16, 19
Giboney v. Empire Storage & Ice Co., 336 U.S. 490 10, 21, 22
Grain Elevator Workers Local 418 v. NLRB, 376 F.2d 774 (D.C. Cir.), cert. den. 389 U.S. 932 ..... 12, 17

Hughes v. Superior Court, 339 U.S. 460 ..... 10, 21

Incres Steamship Company v. International Maritime Workers Union, 372 U.S. 24 ..... 10, 15
International Brotherhood of Teamsters Union v. Hanke, 339 U.S. 470 ..... 10, 21, 22
International Longshoremen's Association Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 18
International Wood Workers of America (T. Smith & Sons, Inc.), 125 NLRB 209 18

Local 761 International Union of Electrical, etc. v. NLRB, 366 U.S. 667 ..... 14, 26

PAGE

Local Union No. 10 etc. v. Graham, 345 U.S. 192, 197 13, 24, 26
Local Union No. 25 v. New York, New Haven & H.R. Co., 350 U.S. 155 ..... 12, 17

Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014 (7 Cir.), cert. den. 379 U.S. 967 ..... 12, 17
McCulloch v. Sociedad National de Marineros de Honduras, 372 U.S. 10 ..... 10, 15

NAACP v. Button, 371 U.S. 415, 444 22

Pennington v. Birmingham Baseball Club, 277 Ala. 336, 170 So. 2d 410 22
Plumbers, etc. Local 298 v. County of Door, 359 U.S. 354 ..... 12, 17
Police Department of the City of Chicago v. Mosley, 408 U.S. 92 ..... 12, 20, 22, 23
Port of Houston Authority etc. v. International Organization of Masters Mates etc., et al., 456 F.2d 50 (5 Cir.), cert. den. 409 U.S. 894 7

Ramey Construction Co. Inc. v. Local Union No. 544, Painters, etc., 472 F.2d 1127 (5 Cir.) 14, 27

Seafarers International Union v. NLRB, 265 F.2d 585, 592 (D.C. Cir.) 14, 26

Teamsters etc. v. Vogt, Inc., 354 U.S. 284 ..... 10, 13, 21
Teamsters Local 20 v. Morton, 377 U.S. 252 17
Thomas v. Collins, 323 U.S. 516 20
Thornhill v. Alabama, 310 U.S. 88 ..... 12, 20, 23

United Steelworkers v. NLRB, 376 U.S. 492 ..... 14, 26

PAGE

Washington-Oregon Shingle Weavers' Council, 101 NLRB 1159 18
Windward Shipping (London) Ltd. et al. v. American Radio Association, AFL-CIO, et al., —— U.S. ——, 94 S.Ct. 959 ..... 7, 11, 18, 19, 20

Statutes and Regulations:

National Labor Relations Act
§2 16
§7 2
§8 (b) (4) 2, 11, 18
28 U.S.C. §1257 (3) 2
46 U.S.C. §1242 (a) 18
46 U.S.C. §1283 (a) 18
26 C.F.R. §308 18

Congressional Materials:

Hearings, Energy Transportation Security Act of 1974, House Subcomm. on Merchant Marine, 93rd Cong., Ser. No. 93-26 18

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.,
and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Supreme Court of Alabama, dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama, is set forth at pages 5a-26a* and is reported at 279 So.2d 467.

The denial by the Supreme Court of Alabama, dated July 5, 1973, of the application for rehearing, which was entered without opinion, is set forth at page 27a.

* References are to pages of Single Appendix.

The order for injunction of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is set forth at pages 28a-30a; that court issued no opinion, findings of fact or conclusions of law.

Jurisdiction

The order of the Supreme Court of Alabama issued and was entered on May 3, 1973 (5a-26a). An application for a rehearing was denied on July 5, 1973 (27a). Petitioners' time to file their petition for a writ of certiorari was extended to and including November 9, 1973, by order of Mr. Justice Powell, Jr., dated September 18, 1973. The petition for certiorari was filed in this Court on November 8, 1973 and was granted on February 25, 1974. The time to file petitioners' Appendix and brief on the merits was duly extended to June 15, 1974.

The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

The relevant Constitutional provisions are:

"Article VI, 2nd Paragraph (Supremacy Clause); First and Fourteenth Amendments."

The relevant statutory provisions are:

"National Labor Relations Act, Sections 7, 8(b)(4); 29 U.S.C. §§157, 158(b)(4)."

The text of these statutory provisions is set forth in the Appendix (1a-4a).

Questions Presented

The state court injunction prohibited peaceful primary informational picketing of foreign flag vessels in the Port of Mobile. The picketing, in the nature of a "Buy American" campaign, protested the loss of jobs of American seamen to foreign flag vessels paying substandard wages and benefits. The picketing was conducted by a group of American maritime unions which did not seek to represent, organize or support the crews of the foreign flag vessels. Some American workers voluntarily refused to cross the picket line. The complainants were an association comprising local stevedoring companies and shipping companies in the Port of Mobile and a local farmer whose produce was shipped through that port. The injunction was issued without any opinion, findings of fact or conclusions of law. The questions thus presented are:

1. Whether the state court is without jurisdiction to adjudicate the controversy because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board.

2. Whether the prohibition of peaceful informational picketing abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution.

Statement

The Facts

The union petitioners are six American maritime unions (42a-43a), representing a substantial majority of American merchant seamen. Petitioners in 1971, formed into a Committee of American Maritime Unions in an endeavor to formulate and implement plans to arrest the alarming and accelerating decline in the number of jobs aboard American merchant vessels, available to their members (92a-95a), brought about by foreign flag vessels carrying American seaborne commerce and paying substandard wages and benefits, in contrast to those paid American merchant seamen, union petitioners' members (92a-94a).

The union petitioners specifically agreed to selectively and peacefully picket foreign flag vessels at United States ports, truthfully publicizing the competitive advantage of the foreign flag vessels, the adverse consequences thereof upon their members and simultaneously appeal to the public not to patronize such foreign flag vessels (95a). In connection with such peaceful publicity picketing, the Committee prepared picket signs which read as follows:

> "'ATTENTION TO THE PUBLIC
>
> "'The wages and benefits paid aboard the vessel SS * are substandard to those of the American seamen. This results in extreme damage to our wage standard and the loss of our jobs.
>
> "'Please do not patronize these vessels. Help the American seamen.
>
> "'We have no dispute with other vessels at this site.'" (95a)

[The names of the picketing unions appeared beneath the quoted matter.]

* Name of vessel was inserted in the blank space.

The Committee further prepared pamphlets for distribution which publicized information of similar import to that set forth on the picket sign and which read:

> "TO THE PUBLIC
>
> "American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.
>
> "American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.
>
> "A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.
>
> "PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.
>
> "Our dispute here is limited to the vessel picket at this site, the SS ."
>
> [The names of the picketing unions appeared at the bottom of the pamphlets] (91a).

Finally, the Committee set forth written instructions, distributed by each Committee member to its local representatives, advising them of the Committee's action and decision to engage in truthful publicity and picketing and relating to the carrying out of the Committee's program. Such advice and instructions stated:

Your Union, along with other American Maritime Unions, has formed a Committee, to protest the loss of jobs to Foreign Flag operators transporting American Commerce and who operate such vessels at wages and benefits substandard to those enjoyed by American Seamen.

In support of this protest, these Unions are setting up publicity picketing around such Foreign Flag Vessels in American Ports.

Our organization will participate in carrying out this publicity picketing.

In connection with this activity, if the publicity picketing is to take place in your Port, the following instructions must be followed to the letter.

1. If the vessel is at a Terminal and access cannot be had alongside the vessel, request must be made to the Terminal operator for the opportunity to picket alongside the vessel. If this request is denied, picketing is to take place at the entrance to the Terminal. Make a memorandum of your conversation with the Terminal operator.

2. There should be no more than 4 pickets at any one site, at any one time. Pickets must be instructed that all picketing must be peaceful and they must ignore any acts of provocation. Picket signs with the correct language will be furnished to your Port.

3. Your Port will be furnished with leaflets. All pickets are to carry a sufficient amount of leaflets which they will distribute as they picket. Pickets must be clearly instructed that under no circumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet.

4. If anyone asks you, as Port Agent, or asks the pickets whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet.

5. In response to any inquiries, from other Unions, to you or your representative at your Port, refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More. If any of the pickets are served with a legal paper, they are to call their Union Office immediately. They are not to speak to anybody else. In the event legal papers are served, you must notify your headquarters immediately.

6. Any and all inquiries directed to you from the Press or anybody else, should be referred to your Headquarters. Do not engage in any conversation with such persons.

7. No one has authority to change these instructions except upon specific written authority from your Headquarters.

[The names of the picketing unions appeared beneath the quoted matter.] (113a, 114a)[1]

At the Port of Mobile, the unions requested permission from the Alabama State Docks ("Docks"), to picket alongside foreign flag vessels within the former's premises and upon refusal picketed immediately in front of the Docks' premises with the foregoing picket signs referring thereon to the named vessels (96a). Shortly thereafter the Docks

1. See *Windward Shipping (London), Ltd., et al.* v. *American Radio Association, AFL-CIO, et al.*, —— U.S. ——, 94 S. Ct. 959 (February 1974), and *Port of Houston Authority, etc.* v. *International Organization of Masters Mates, etc., et al*, 456 F.2d 50 (5 Cir.) 1972 (cert. den. 409 U.S. 894), involving the union petitioners in the identical national picketing dispute as part of the Committee's program as at bar and the findings as to the purposes and objects thereof, to wit, truthful publicity picketing and dissemination of information as to the issues regarding American merchant seamen, depressed employment opportunities and the substantial cause thereof.

granted permission (96a) to picket within their premises and no more than four pickets patrolled with the picket signs, with the picketing shortly thereafter limited to one vessel, the Liberian vessel, AQUA GLORY (7a, 8a). The picketing was peaceful, no violence or mass picketing, trespassing or blocking of ingress or egress to the premises; no shouting or assault and no acts of force (8a). The pickets carrying the aforementioned signs remained silent and distributed the aforesaid pamphlets (8a). Longshoremen individually refused to cross the picket line (71a) and as a consequence, the AQUA GLORY was not serviced (9a, 71a).

Respondent Mobile Steamship Association, Inc. ("Association") is a non-profit corporation, organized and existing under Alabama law. Its membership consists of steamship and stevedoring companies doing business in Alabama (67a). The Association is the collective bargaining representative and contract negotiator for such companies, in their labor management business relations with the International Longshoremen's Association who represent stevedoring employees employed by the Association's members, and particularly at the Port of Mobile, Alabama (5a-6a, 35a).

Respondent Robert E. Malone, is a farmer in Mobile County, Alabama. He is engaged in growing soybeans which are delivered to grain elevators at the Docks and thereafter loaded aboard vessels for export (6a).

The Litigation

The Association filed suit in an Alabama state court seeking to enjoin the picketing as tortious under Alabama law. The basis for the claim was that the unions had directed employees of the Association members to refuse to work upon or serve such picketed vessels and that the same, together with the threat to picket other foreign flag vessels constituted unlawful interference with the contractual relationship between Association members and the companies operating the picketed vessels, and the Association members' right to carry on their lawful business (37a-39a). Respondent Malone intervened (6a) and claimed the unions' activity similarly unlawfully interfered with his right to carry on his lawful business (47a).

The petitioners, by way of demurrer, presented several defenses, including, that the jurisdiction of the Alabama court was preempted by the NLRA and that the picketing activities were peaceful information picketing protected by the First and Fourteenth Amendments. After hearing and without any findings of fact or conclusions of law and without opinion, the Alabama Circuit Court issued its broad preliminary injunction order, totally silencing the petitioners' activities, including restraining the use of their spoken words (28a-30a), although the evidence is clear that no words were spoken. Upon petitioners' appeal to the Alabama Supreme Court, the Court in an apparent effort to salvage the Circuit Court's preliminary injunction, stated:

> "The trial judge's decree, granting the writ of temporary injunction, made no finding of fact from the evidence. But apparently the trial judge found from the evidence that there was wrongful interference by the appellants with the appellees' business, for otherwise, he would not have ordered the writ of temporary injunction to issue." (20a, 21a).

The Alabama Supreme Court, citing *Benz, Incres* and *McCulloch,* discussed *infra,* and directing its opinion to the issues raised upon appeal, *inter alia,* held that there was no preemption by virtue of the NLRA because the picketed vessels were foreign flag vessels and that consequently the State Circuit Court possessed the requisite jurisdiction (10a-13a). It also held that since there was a hope by a low level representative of one of the Committee's Unions that longshoremen would not cross the picket line and because such hope was realized, there was a tortious interference with the business of the respondents, activities without the protection of the First Amendment and concerning which Fourteenth Amendment strictures were inapplicable. Reliance for such conclusion (17a-25a), was based upon this Court's decisions in *Vogt, Inc., Giboney, Hughes* and *Hanke,* discussed *infra.*

Summary of Argument

1. Preemption

American merchant seamen and their unions, were engaged, on public thoroughfares or private property with the consent of the owner, in peaceful, truthful and non-obstructive picketing of select foreign flag vessels in the United States, protesting and publicizing that such vessels' wages and conditions were substandard to those of American merchant seamen, thus allowing such foreign flag vessels transporting American seaborne commerce a most substantial competitive advantage over American flag vessels, and that there resulted a most substantial decline in their domestic job opportunities. The object of the picketing was emblazoned on the picket signs and repeated in

the leaflets distributed by the mute pickets, namely, that the public should not patronize, in effect should boycott or not work upon, such select picketed foreign flag vessels.

The picketing petitioner unions and their members, may not have their activities restrained by state courts upon complaints of American stevedoring companies and other American persons doing business at the picketed site, alleging that the petitioners' activities were partially successful, in that they directed employees of the American stevedoring companies to refuse to work upon, or to provide services for or to the picketed vessels, resulting in interference with and preclusion of, other Americans from delivering their products at such sites.

Neither the *Benz* trilogy, *infra,* nor this Court's opinion in *Windward Shipping (London) Ltd. et al.* v. *American Radio Association, AFL-CIO, et al.,* —— U.S ——, 94 S.Ct. 959, holding that petitioners' identical picketing and conduct directed against a foreign flag vessel owned by a foreign shipowner[2] was not "in commerce" within the meaning of the Act, do not authorize state court jurisdiction of the complaints of respondents, American stevedoring companies and an American farmer. Those complaints allege that the picketing is directed at their business activities and constitutes an interference with the business activities of the Americans. Such picketing is "in commerce". The determination of the conduct alleged in the complaints is within the exclusive competence of the NLRB by virtue of the Act's §8(b)(4), as either lawful or pro-

2. As to a foreign flag vessel not owned by a foreign shipowner, but instead owned by an American shipowner, and constructively deemed an American vessel under effective U.S. control, see fn. 5, *infra.*

hibited activity. In either event, state courts are preempted from exercising jurisdiction. *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776,* 346 U.S. 485.

Notwithstanding that the entity against which the picketing is directed may not be within the coverage of the Act, the conduct complained of by the respondents is nevertheless preempted to the NLRB. *Local Union No. 25* v. *New York, New Haven and H.R. Co.,* 350 U.S. 155; *Plumbers, etc. Local 298* v. *County of Door,* 359 U.S. 354.

The object of petitioners' dispute may be foreign. However, respondents complain that petitioners' activities were secondary, involving employees of stevedoring companies, etc., working at Mobile, Alabama. Under such posture, respondents' complaint is domestic and state courts possess no jurisdiction to grant injunctive relief to respondents, as jurisdiction is exclusively within the NLRB. *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7 Cir.), cert. den. 379 U.S. 967; *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir.), cert. den. 389 U.S. 932.

2. Free Speech

Petitioners' picketing constitutes in all respects, a traditional exercise of the right of free speech guaranteed by the First Amendment—an important and protected activity in labor disputes and immune from state court interference, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza,* 391 U.S. 308, 313; *Thornhill* v. *Alabama,* 310 U.S. 88; *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92 and *Allee* v. *Medrano,* —— U.S. ——, No. 72—1125, decided May 20, 1974.

Although states within their domain may regulate picketing not federally preempted, such regulation must be in implementation of a clear and valid public policy. *Teamsters, etc.* v. *Vogt, Inc.,* 354 U.S. 284. Premising an assumed valid state public policy solely on the generic term of wrongful interference with business, without expressing or defining what constitutes such wrongfulness, so as to permit state court restraint of conduct, as at bar, is contrary to, and in violation of, First and Fourteenth Amendment guarantees, *Logan Valley, supra.* Nothing contained in the panoply of constitutional rights authorizes state courts, as at bar, to exalt property rights over First Amendment guarantees of freedom of speech and assembly.

Equally significant, is that before states, even within their domain, may impinge upon or abridge what has been guaranteed by the Bill of Rights, specific findings related to reality, must be made by the restraining court. *Local Union No. 10 etc.* v. *Graham,* 345 U.S. 192, 197. Such requisite task was not performed, let alone attempted, by the Alabama courts. Endeavors by the Alabama Supreme Court to create non-existent findings by inferences, based upon personal hopes or expectations of a lone witness—hopes as to the success of the picketing activities by a person without authority and charged solely with perfunctory administrative duties—do not constitute compliance with the requirement for findings consistent with concerns for and protection of the fundamental guarantees of freedom of speech.

Finally, contrary to the Alabama Supreme Court's conclusions, hopes and expectations of the success of lawful

picketing activities in labor disputes, do not convert the activities into unlawfulness. *Seafarers International Union* v. *NLRB*, 265 F.2d 585, 592 (D.C. Cir.); *Local 761 International Union of Electrical, etc.* v. *NLRB*, 366 U.S. 667; *United Steelworkers* v. *NLRB*, 376 U.S. 492, 501 and *Ramey Construction Co. Inc.* v. *Local Union No. 544, Painters, etc.*, 472 F.2d 1127 (5 Cir.).

ARGUMENT

I.

Where respondents, American citizens, complained of petitioners' conduct in the port of Mobile, Alabama, alleging activities violative of the Act's Section 8(b)(4), Alabama state courts were without jurisdiction to grant injunctive relief, notwithstanding the objects of the pickets were foreign flag vessels. Such conduct is preempted by the NLRB.

Respondent Association, an Alabama corporation, does business in Alabama, with its principal business in the port of Mobile (33a); it is the collective bargaining representative of stevedore employer members in the port of Mobile; it bargains and executes collective bargaining agreements with the International Longshoremen's Association (68a) and files and causes to be processed, unfair labor practice charges with the NLRB (68a). Without question, the Association is an employer under the Act.

Respondent Malone is a farmer engaged in farming in Alabama and transports his agricultural products to the docks at the port of Mobile for foreign export (43a, 44a).

Both respondents, Association and Malone, in their pleadings, complained that petitioners' picketing of the foreign vessels, at the Mobile docks, consisted of conduct directed to employees of employers other than the vessels, "to refuse to provide any work or service with respect to such vessels" (37a, 47a). Additionally, both respondents alleged that employee longshoremen of Association's members, refused to cross the picket line and work upon the picketed vessels (36a, 46a). Further complained of by both respondents, was that such picketing activities constituted an unlawful interference with respondents' contractual relations and unlawful interference with their right to carry on their business (37a, 47a).

Notwithstanding the foregoing admitted facts, that both respondents are American citizens, "employer" or "person" under the Act, that the conduct occurred at the loading docks in Mobile, Alabama, involving water transportation there and the storage or loading of products for such transportation, and the further allegations of interference or inducement to employees of other employers to cease doing business, nevertheless the Alabama Supreme Court, without any trial court findings or conclusions, concluded the Act inapplicable because the objects of the picketing, the foreign vessels, were not "in commerce", citing *Benz* v. *Campania Naviera Hidalgo*, 353 U.S. 138; *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 and *Incres Steamship Company* v. *International Maritime Workers Union*, 372 U.S. 24.

Unquestionably, the Association, constituting stevedoring companies employing longshoremen to load and discharge vessels at the port of Mobile, Alabama, is an "em-

ployer'' engaged in ''commerce'' under the Act, and equally unquestionably, respondent Malone, delivering his soybeans to the dock elevator, is a ''person'' engaged in ''commerce'', under the Act.[3]

Where it is charged, such as at bar, that petitioners directed employees of Association members, ''to refuse to provide any work or service with respect to such (picketed) vessels'' (37a, 47a), and by virtue of petitioners' picket lines at said vessels, Association members' employees refused to work upon said vessels (36a, 47a), such complained of conduct constitutes a charge of violation of the Act's §8(b)(4). In such a posture, exclusive jurisdiction to evaluate and determine the conduct for injunctive remedy, if any, is with the NLRB, *Garner* v. *Teamsters Chauffeurs & Helpers Local Union No. 776,* 346 U.S. 485. Such exclusive

3. Sec. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

NLRB jurisdiction,[4] remains inviolate, notwithstanding the union's activities are directed at an entity whose employer-employee relations, similar to those at bar, may not be subject to the Act's coverage. *Local Union No. 25* v. *New York, New Haven and H. R. Co.,* 350 U.S. 155; *Plumbers etc. Local 298* v. *County of Door,* 359 U.S. 354.

The foregoing issue and its mandated result for NLRB exclusive jurisdiction—preemption—is not unique. In *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7 Cir.), cert. den. 379 U.S. 967 and *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir.), cert. den. 389 U.S. 932, a Canadian flag vessel was picketed by unions in the United States. In defense against charges of unfair labor practice before the NLRB, and the Board's application for preliminary injunction pursuant to the Act's §10(1), the unions contended that there was no NLRB jurisdiction—no ''commerce'', by reason of this Court's *Benz* trilogy holdings *supra.* Such defense was rejected by both Circuits, the D.C. Circuit stating:

> ''The short answer is the Board is not here exercising jurisdiction over the Canadian primary dispute, but over secondary activity in this country, ''directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer.'' 376 F.2d at 776.

And so at bar. The conduct respondents here complain of and allege—the secondary activity, the direction and inducement of Association member's employees not to work

4. Discussed here, is solely the issue of the granting of injunctive relief and not actions for compensatory damages for the violations of the Labor Management Relations Act's §303, as to which state court jurisdiction is concurrent. *Teamsters Local 20* v. *Morton,* 377 U.S. 252.

the picketed vessels and not to load the soybeans and other commodities thereon, are allegations of traditional secondary bycott, activity protected or prohibited under the Act's §8(b)(4). Although the dispute with the vessels may be foreign,[5] the petitioners' activities respondents complain of here, are domestic.[6]

5. This Court's recent decision in *Windward Shipping etc. et al.* v. *American Radio Association, AFL-CIO, et al.*, —— U.S. ——, 94 S. Ct. 959, decided February 19, 1974, six days prior to the grant of certiorari in the instant case, passed upon identical picketing activities, but there in Houston, Texas. The Court concluded that petitioners' lawful and peaceful protest picketing activities did not meet the "in commerce" test as in *International Longshoremen's Association, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, but instead were within the reach of the *Benz* trilogy. By reason of *Windward's* posture, arising from the Texas courts and there premised upon *Ariadne* alone, not presented or considered by this Court and therefore left open in *Windward*, which was limited to "foreign shipowners" of foreign flag vessels, 94 S. Ct. at 965, was preemption with respect to major corporate American citizen-owned vast fleets of foreign flag vessels, practically all of the American petroleum industry or of American multi-national corporations, all registered and flying Panamanian, Liberian or Honduran flags, under a defined category of "effective U.S. control" ("EUSC"), which are deemed constructively American, pursuant to 46 U.S.C. §§1242(a), 1283(a) and 46 C.F.R. 308.1-308.536; see *Hearings, Energy Transportation Security Act of 1974, House Subcomm. on Merchant Marine*, 93rd Cong., Ser. No. 93-26, pp. 21, 22, 52-72, 605, 606, 608-612. None of the *Windward ratio decidendi*, nor the concern for traditional comity in international maritime affairs, apply to those American owned "EUSC" vessels; i.e. non-existent would be the *Windward* concern for, "the private balance sheets of the foreign shipowners", or a concern that there might be "retaliatory action" or "exacerbat(ion) and broaden(ing) (of) the present dispute", by the registered nations against American vessels, since such EUSC vessels' voluntary commitment to the U.S. and to American citizens' control is with the advance consent and understanding of Liberia, Panama and Honduras, or a concern as to "predictable response(s)", of a foreign shipowner, 94 S. Ct. at 965, since such vessels are American corporate citizen-owned with "American directors, American officers, and American shareholders [who] have made [EUSC] a solemn commitment", *Hearings, ibid.* pp. 608, 609.

6. See: *Washington-Oregon Shingle Weavers' Council*, 101 NLRB 1159, 1161 (1952) and *International Wood Workers of America (T. Smith & Sons, Inc.)*, 125 NLRB 209 (1959), where the primary dispute was Canadian, but the conduct complained of found to be domestic, occurring here in the United States and subject to NLRB appropriate remedy.

The Alabama courts were without authority to assume jurisdiction of respondents' complaints and issue injunctive relief. Jurisdiction is preempted by the NLRB, vested with exclusive authority to pass upon the conduct complained of and to determine the granting of injunctive relief, if any, *Garner, supra.*

The order of the Alabama Circuit Court as affirmed by the Alabama Supreme Court should be reversed and vacated and respondents' complaints dismissed.

II.

Peaceful, primary, informational picketing to protest the loss of domestic jobs to foreign flag vessels paying wages and benefits substandard to American flag vessels, concomitantly requesting persons to ostracize and not patronize such foreign flag vessels, is an exercise of constitutionally protected freedom of speech and should not have been enjoined by the Alabama courts.

As recently found by this Court in *Windward*, 94 S.Ct. at 961, and as the record here demonstrates, petitioners unions, representing a substantial majority of American merchant seamen, agreed to undertake, as a Committee, joint action to arrest an accelerating decline in job opportunities for their members in the United States, attributable to substantial competitive wage and benefit advantage of foreign flag vessels transporting American seaborne commerce. In furtherance of such joint action, and pursuant to the Committee's instructions from headquarters in New York, the petitioners peacefully, truthfully and without

trespass or obstruction, picketed select foreign flag vessels. The pickets, without conversation, distributed pamphlets explaining the facts of the dispute and requested the public to ostracize and not patronize the picketed foreign flag vessels, 94 S.Ct. at 962. Such activities of petitioners' Committee, were engaged in at various U.S. ports and in *Windward, supra,* at Houston, Texas, and at bar, Mobile, Alabama. The aforesaid activities we submit, constitute the lawful exercise of protected fundamental rights of free speech.

As this Court most recently reemphasized in *Allee* v. *Medrano,* —— U.S. ——, No. 72-1125, decided May 20, 1974:

> "The Court has long recognized that the First Amendment's guarantees of free speech and assembly have an important role to play in labor disputes. *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940); *Thomas* v. *Collins,* 323 U.S. 516, 532 (1945)."[7]

This Court in *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza,* 391 U.S. 308, 313, squarely held that picketing, identical as at bar, to peacefully and truthfully publicize substandard wages and concomitantly request the public not to patronize the picketed entity, is conduct protected by the First and Fourteenth Amendments, whose principles and guarantees the states are mandated to observe inviolate. Only recently this Court again reaffirmed its *Logan Valley* holding that "* * * picketing plainly involves expressive conduct within the protection of the First Amendment * * *," *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 99.

7. P. 9, slip opinion of Mr. Chief Justice Burger concurring and dissenting and in accord with majority, slip opinion fn. 13.

At bar, the pickets, engaged in expressive conduct, doing nothing more than imploring the public, by lawful means, to euphemistically "Buy American" or "Ship American."

The Alabama Supreme Court concluded that, by virtue of this Court's authorities,[8] it was free to restrain petitioners' exercise of their First Amendment rights. Such conclusion we submit, is grievous error.

The *Vogt* Court made clear, in collating and summarizing its prior *Giboney, Hughes, Hanke* and *Gazzam* decisions, that before states may regulate or restrain a union's picketing, a mandatory precondition, *inter alia,* is that such regulation is "* * * in a domain open to state regulation", 354 U.S. at 291. As demonstrated in our Point I, *supra,* such domain has been foreclosed to the states and the regulation or restraint of the petitioners' picketing activities vested exclusively within the competence of the NLRB.

Assuming *arguendo,* that there was a domain open to Alabama for regulation, nevertheless as this Court has further informed, such regulation has been circumscribed with appropriate predicates and limitations. In *Vogt, supra,* this Court cautioned:

> "Of course, the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts no more than state legislatures, can enact blanket prohibitions." 354 U.S. at 294, 295.

8. *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490; *Hughes* v. *Superior Court,* 339 U.S. 460; *International Brotherhood of Teamsters Union* v. *Hanke,* 339 U.S. 470; *Building Service Employees International Union* v. *Gazzam,* 339 U.S. 532 and *Teamsters, etc.* v. *Vogt, Inc.,* 354 U.S. 284.

Furthermore, a prerequisite or condition for state regulation of picketing, is that such regulation must seek implementation of a state's "valid public policy", *Hanke, supra,* a "valid law", *Giboney, supra.* Additionally, where as here, "the picketing plainly involves expressive conduct within the First Amendment", *Mosley, supra,* the state must advance a "* * * substantial regulatory interest in the form of substantive evils flowing from petitioners' activities", to justify its restraint, *NAACP* v. *Button,* 371 U. S. 415, 444. Such mandatory constitutional test was not met at bar.

The Alabama courts advise,[9] that such allegedly valid state law, its valid public policy, is,

> "The right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected, if necessary, by injunctive process." (20a).

What is wrongful or unlawful interference is never expressed or defined, let alone clearly so. Surely valid state policy is not the rendering mute of labor unions and restraining their truthful protest picketing, so that an Alabama resident, permanent or temporary, may be immunized from protest of substandard wages and working conditions. Nor is such truthful, lawful picketing, "wrongful" interference with that person's business. Any such policy would patently not be valid. It would exalt property rights and their preservation over the exercise of treasured and most valuable First Amendment rights. It would insulate and freeze the present and foreclose advocacy of change for the future.

9. *Pennington* v. *Birmingham Baseball Club,* 277 Ala. 336, 170 So. 2d 410.

Under the foregoing Alabama "state policy" the constitutionally protected activity and conduct found in *Logan Valley, supra,* reaffirmed in *Mosley, supra,* picketing to publicize substandard wages and appeals to persons not to patronize the picketed business, is, *ipsi dixit,* converted into wrongful interference under Alabama law, warranting its restraint. This Court has time and again held, as witness most recently *Logan Valley,* that the mere fact a primary picket line may dissuade persons from patronizing a premises and may result in injury or damage, cannot be the basis for restricting the lawful and peaceful protest picketing. Guarantees of free speech preclude such a restraint, *Thornhill* v. *Alabama,* 310 U.S. 88, 104, 105; *Carlson* v. *California,* 310 U.S. 106, 112. Under Alabama's policy, this Court's recognition of the important role First Amendment guarantees of free speech play in labor disputes and concern for their preservation,[10] would be diminished to zero. The Court in *Thornhill* found Alabama's legislature to be off the loom of constitutional protection, and at bar, we respectfully submit, it is Alabama's courts who are now unfortunately off the loom.

The consistent activities and purposes of petitioners, constituting the Committee for American Maritime Unions, before this and other courts, conclusively demonstrate their uniform lawful protest picketing activities. To conclude from such activities that they constitute a "wrongful interference" as Alabama has at bar, totally ignores and rejects mandated observation of the constitutional precepts, *supra.* Compounding such error is the Alabama's court's treatment of the results of the hearing had upon respondents' applications.

10. *Allee* v. *Medrano, supra.*

As a predicate for its affirmance of the trial court's restraint, the Alabama Supreme Court stated:

> "* * * the trial judge made no finding of fact from the evidence. But apparently the trial judge found from the evidence that there was wrongful interference by the appellants with the appellees' business for otherwise he would not have ordered the writ of temporary injunction to issue." (21a)

Under such unusual judicial rationalization, appellate courts probably are unnecessary, as assumedly trial courts make proper findings or conclusions, otherwise they would not have entered their orders. Crucially significant, is that constitutional protections mandate considerably more before our fundamental rights and protections are rendered inapplicable.

In *Local Union No. 10 etc.* v. *Graham*, 345 U.S. 192, 197, this Court quoted approvingly from *Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 293, 294, as follows:

> "* * * it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact, screening reality. That is why this Court has the ultimate power to search the records in state courts where a claim of constitutionality is effectively made. * * *"

Applying the foregoing test, impelled by the importance of our constitutional freedoms and their preservation, demonstrates the grievous error of the court below.

Without the benefit of any trial findings, the Alabama Supreme Court, in order to infer what it believed the trial court found,[11] relied solely upon the enthusiastic testimony

11. Merely to express the event demonstrates its absurdity.

of a local port agent, a low level official of one of the unions comprising the Committee, to wit, a Mr. Neira, who admittedly was not a union representative to such Committee, and whose sole function and authority was to carry out the Committee's written instructions. That testimony, fairly read, unquestionably was his own personal expression of what he hoped the picketing would accomplish (107a-144a). Even in its erroneous reliances the court below did not however rely upon the totality of Neira's testimony. Instead it quoted a few vagrant personal expressions of his hope that the picketing would be effective. And the Alabama Supreme Court apparently recognized that Neira's testimony was at best only his hope, for it then relied on inapposite authority to convert such personal hope of this low level functionary, into the six picketing unions' purposes and objects (24a-25a).

Neira's testimony from the witness stand cannot, of course, change the purpose of the picketing as set forth on the picket signs and in the leaflets distributed by the mute pickets. Moreover, the purpose of the picketing was clearly set forth in the instructions which Neira received from the Committee of American Maritime Unions (113a, 114a). It is to be noted that the final numbered instruction advised that no one had authority to change the instructions except upon a writing from the Committee's headquarters. Neira testified that he had no authority to change the instructions (141a, 142a). Manifestly, whatever hope Neira entertained *in pectore* on the picket line, and later articulated on the witness stand, could not in any event have changed the purpose or the character of the peaceful primary nonobstructive informational picketing,

at the site of the vessels. It is more than distressing that the freedom of speech of American workingmen can be snatched away on such a feeble ground. Equally as distressing is that it does violence to the standards which this Court has expressly said must be met before such valuable constitutional rights may be impinged upon, *Graham, supra.*

Although the Alabama Supreme Court concluded that hope became the object or purpose and relied upon inapposite authorities to equate the terms, this Court has instructed otherwise.

In *Seafarers International Union* v. *N.L.R.B.*, 265 F.2d 585, 592 (D.C. Cir.), it was held that hopes entertained by primary pickets that employees of secondary employers would not cross the picket line could not render the picketing unlawful. In *Local 761 International Union of Electrical, etc.* v. *N.L.R.B.*, 366 U.S. 667, this Court quoted with approval those portions of the opinion in the *Seafarers* case concerning the hope of the pickets that the picket line would be honored and the holding that picketing which induced secondary employees to respect a primary picket line is not the equivalent of picketing which has as an object the inducing of employees to engage in concerted conduct against their own secondary employer in order to force him to refuse to deal with the primary employer (*id.* at 673). This Court there held that primary picketing at a common situs, appealing to neutral employees whose tasks aid the primary employer's everyday operations, is not unlawful; accord, *United Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, 501. Hopes and expectations do not constitute

objects or purposes. *Ramey Construction Co., Inc.* v. *Local Union No. 544, Painters, etc.*, 472 F.2d 1127 (5 Cir.).

The foregoing demonstrates that petitioners were engaged in the exercise of activities protected by the First and Fourteenth Amendments and that the court below, by its restraint, has deprived petitioners of their freedom of speech.

Conclusion

The order of the Alabama state courts, restraining petitioners, should be reversed in all respects and respondents' complaints dismissed.

Respectfully submittted,

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:

SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York